and he failed to appear at the trial of the action to give evidence as to why the accident happened.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Shearn, Delamore & Co.; Murphy & Dunbar; Chooi & Co.*

OVERSEAS UNION FINANCE LTD. v. GOVINDASAMY

[F.C. (Azmi L.P., Gill and Ong Hock Sim F.JJ.)

March 27, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 91 of 1972]

Housing Developers — Developers also licensed moneylenders — Sale of house — Balance of purchase price raised by loan from developers/moneylenders — Charge of land to secure loan — Whether moneylending transaction — Moneylenders Ordinance, 1951.

The appellants were housing developers as well as licensed moneylenders. In the course of their business as such developers, they sold to the respondent a piece of land and a house thereon for $16,000. The respondent made a down-payment of $2,500 and agreed to pay the balance by monthly instalments inclusive of interest. A transfer of the property was executed in favour of the respondents, who in turn executed a charge of the property in favour of the appellants. The respondent having failed to pay the instalments, the appellants applied for an order for the sale of the property. The application was dismissed on the ground that the appellants, being moneylenders had not complied with the Moneylenders Ordinance, 1951 in that no memorandum of the contract between the parties was executed, no authenticated copy supplied to the respondent and no statement of account was produced.

Held, allowing the appeal: on the evidence there was no loan at all between the appellants and the respondent. The transaction in this case was not entered into by the appellants in the course of their business as moneylenders.

Cases referred to:-

(1) *Overseas Union Finance Ltd.* v. *Lim Joo Chung* [1971] 2 M.L.J. 124.

(2) *Poh Kim Kang & Ors.* v. *Ishak bin Lambik & Anor.* [1971] 2 M.L.J. 251.

(3) *Olds Discount Co. Ltd.* v. *John Playfair Ltd.* 159 L.T. 332.

(4) *Rabone* v. *Deane* (1915) 20 C.L.R. 636.

FEDERAL COURT.

S. D. K. Peddie for the appellants.

S. A. Raj for the respondent.

Gill F.J. (delivering judgment of the court): The appellants are housing developers as well as licensed moneylenders. In the course of their business as such developers, they sold to the respondent a piece of land with a house thereon in a housing area known as Puchong Garden for a sum of $16,000. The respondent made a down payment of $2,500 and agreed to pay the balance of $13,500 by monthly instalments inclusive of interest of $199.80. Simultaneously with the appellants executing a transfer of the property in favour of the respondent, the respondent executed a charge over the property in favour of the appellants to secure the balance of the purchase price. Both the transfer and the charge were presented to the Land Office for registration on September 18, 1968.

The respondent having failed to pay the instalments as and when they fell due under the charge, the appellants on October 5, 1971 took out an Originating Summons to apply for an order that the land, the subject matter of the charge, be sold by public auction for the recovery of the sum of $13,165.95 then due under the charge. Their application, when it came up for hearing in due course, was dismissed.

Against the dismissal of their application the appellants appealed to this court.

The application in the court below was opposed on the ground that the appellants, being licensed moneylenders, had not complied with section 16(1) of the Moneylenders Ordinance, 1951 in that no memorandum of the contract between the parties was executed with a delivery of an authenticated copy thereof to the respondent, and that no statement of account as required by section 21(1) of the Ordinance had been produced. It was also contended that section 19 of the Ordinance as regards the obligation to supply information as to state of loan and copies of documents relating thereto had not been complied with, and it was further contended that the demand made under the loan was defective by reason of the non-compliance with sections 19 and 21 of the Ordinance. In support of these contentions, counsel for the respondent relied on the case of *Overseas Union Finance Ltd.* v. *Lim Joo Chong.*(1)

The case for the appellants briefly was that the transaction between the parties was not one of moneylending and therefore not subject to the moneylenders Ordinance. For this they relied on the case of *Poh Kim Kang & Ors.* v. *Ishak bin Lambik & Anor.*(2).

In dismissing the application, the learned trial judge took the view that the fact that there was a loan was evident from the memorandum of charge itself which spoke of "the repayment on demand of the sum of $13,500 *lent*". In other words, his Lordship was greatly influenced by the word "lent". The conclusion at which he arrived was stated in his judgment as follows:

"In the circumstances of this particular case it is also evident that the applicant was taking a mortgage on loan as a business. Essentially the applicant was carrying on business of moneylending. Even though the applicant company's memorandum of association has set out numerous objects for which the company has been established, it is apparent that the company was carrying on activities particularly concerned with the lending of money. It was plainly within the contemplation of the parties that the respondent was to execute a mortgage to secure repayment of the loan made by the applicant in the course of its business. The transaction was therefore essentially a moneylending transaction, and, as such, there must be strict compliance with the provisions of the Moneylenders Ordinance."

At the hearing of the appeal before us the arguments of counsel for the appellants proceeded on these lines. This was not a moneylending transaction. No money ever passed from the appellants to the respondent. The Moneylenders Ordinance itself shows its restricted application. Section 15 of the Ordinance speaks of "a contract for the repayment of *money lent*". Section 16(1) also speaks of "a contract for

the repayment by the borrower of *money lent* to him" and later says "before the money was lent". Section 16(3) speaks of "the date of the *loan*". Similarly section 17 speaks of "*loan* of money by a moneylender". The main argument by counsel for the respondent in support of the judge's decision was that the words used in the charge were "principal sum", "interest" and "money lent", which correspond with the words used in the Ordinance.

The view which we took of the appeal was that a certain amount of confusion arose in the mind of the learned judge from the two types of business which the appellants were carrying on, it being clear that no problem would have arisen if the appellants, apart from being house developers, had not been licensed moneylenders. It was abundantly clear to us that on the facts, about which there was no dispute, the transaction between the parties was one of sale and purchase of land with a house thereon. It is the nature of the agreement entered into and not its object at which the court has to look in order to decide whether in any particular case the agreement is a moneylending agreement or otherwise. (See *Olds Discount Company Limited* v. *John Playfair Limited*[3]). Notwithstanding the use of the word "lent" in the memorandum of charge, there was no evidence that there was actual payment or physical delivery of money by the appellants to the respondent in respect of the charge. The charge was purely and simply a security for the money due under the sale agreement. In other words, the transaction in question was not one entered into by the appellants in the course of their business as moneylenders. (See *Rabone* v. *Deane*[4]).

The learned judge stated in his judgment that the position in the case cited by Mr. Ronald Yeo on behalf of the appellants was quite different from the position in the instant case and that the facts in the case cited to him by Mr. S. A. Raj on behalf of the respondent were somewhat similar to the facts of the present case except that in that case a memorandum of agreement for the loan pursuant to section 16 of the Moneylenders Ordinance, 1961 was drawn and signed by the parties concerned. In our judgment, this case was practically on all fours with the case of *Poh Kim Kang & Ors.* v. *Ishak bin Lambik & Anor*,[2] which was relied on by counsel for the appellants in the court below. On the evidence before the court in that case there was no loan at all between the plaintiffs and the first defendant. We found the position to be the same in this case. Winslow J. held in that case that the question whether the plaintiffs were carrying on the business of moneylenders could not arise unless a finding was made by the court that there was a loan in the first instance. With that statement of the law we respectfully agreed.

For the reasons which we have stated we allowed the appeal, setting aside the order of the court below and substituting in its place an order in terms of the Originating Summons.

Appeal allowed.

Solicitors: *Skrine & Co.; Clough Thuraisingam & Co.*

PUBLIC PROSECUTOR v. KHOO KAY JIN

[A.Cr.J. (Chang Min Tat J.) April 12, 1973]

[Penang — Criminal Appeal No. 17 of 1973]

Criminal Law and Procedure — Discharge — When discharge should or should not amount to an acquittal — Criminal Procedure Code (S.S. Cap. 21), s. 187(1).

In this case at the trial the prosecution indicated to the court that the complainant whose motor cycle was alleged to have been stolen by the respondent had not been traced and an adjournment was requested. When the learned magistrate indicated his disinclination to grant the adjournment, the prosecuting officer suggested a discharge. The magistrate thereupon discharged him. such discharge amounting to an acquittal.

Held: (1) the case of *Koh Teck Chai* v. *Public Prosecutor*[1] refers to a case where the prosecution indicates to the court under section 187(1) Criminal Procedure Code that it does not propose to carry on with the charge and has no relevance to a case where the prosecution wants to carry on with the charge against the accused but for the moment is unable for some reason to do so;

(2) where the material witnesses are untraceable and there is no reasonable prospect of their coming forward, the prosecution should act under section 187 of the Criminal Procedure Code (S.S. Cap. 21) or enter a *nolle prosequi;*

(3) in this case the order of acquittal and discharge should be set aside and the accused be ordered to stand trial on the charge preferred against him.

Case referred to:-

(1) *Koh Teck Chai* v. *Public Prosecutor* [1968] 1 M.L.J. 166.

CRIMINAL APPEAL.

T. Selventhiranathan (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Chang Min Tat J.: The respondent was discharged, such discharge being made to amount to an acquittal when the prosecution indicated to the court that the complainant whose motor cycle was alleged to have been stolen by the respondent had not been traced.

The theft was committed on 31 May 1972 and the accused arrested on 4 June 1972. At the first appearance on 9 June 1972, the accused was charged. He claimed trial and the case set down for hearing on 5 September 1972. He was granted bail. On the day of hearing, the prosecution asked for and obtained a postponement on the ground that the complainant had not been served with a subpoena to attend. It was refixed for hearing on 16 January 1973.

On this day, the prosecution indicated that the complainant could not be traced. The magistrate then recorded that the prosecuting officer suggested a discharge not amounting to an acquittal. The Deputy Public Prosecutor went to some length to submit that that was not the exact position. The prosecuting officer had asked for a further adjournment and it was only when the magistrate showed his disinclination to grant one, that she made the suggestion for a discharge.

Defence counsel then submitted the case of *Koh Teck Chai* v. *Public Prosecutor*[1] and requested for a discharge amounting to an acquittal.

The magistrate thereupon entered a discharge and made it amounting to an acquittal.